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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

STEVE HENLEY,

PETITIONER,

v.

RICKY BELL, WARDEN, RIVERBEND MAXIMUM SECURITY INSTITUTION,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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DEATH PENALTY CASE

QUESTIONS PRESENTED

1. Whether the Sixth Circuit erroneously denied habeas relief by holding, in conflict with the Fifth Circuit's decision in *Peterson v. Cain*, 302 F.3d 508 (5th Cir. 2002), that a defendant's right under the Due Process Clause to challenge the discriminatory composition of the grand jury that indicted him was not sufficiently "dictated" by this Court's precedents in 1990, when Henley's conviction became final.

2. Whether the Sixth Circuit erroneously denied habeas relief by holding, in conflict with decisions of this Court and other courts of appeals, that Henley was not plainly prejudiced by his counsel's deficient performance at sentencing, which included counsel's complete failure to investigate potential mitigation evidence and his impromptu calling of Henley's mother to the stand without ever having spoken with her before, leading to her refusal to testify in front of the jury.

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OPINIONS BELOW

The district court's opinion is reproduced at Pet. App. 94a. The Sixth Circuit's opinion is reported at 487 F.3d 379. Pet. App. 1a. The Tennessee Supreme Court's opinion is reported at 960 S.W.2d 572. Pet. App. 56a. The Tennessee Court of Criminal Appeals' opinion addressing Henley's due process challenge is reproduced at Pet. App. 86a, and its opinion addressing Henley's ineffective assistance claim is reported at 1996 WL 234075. Pet. App. 31a.

JURISDICTION

The Sixth Circuit denied Henley's petition for rehearing and rehearing *en banc* on October 17, 2007. Pet. App. 271a. On January 2, 2008, Justice Stevens extended the time to file the petition for certiorari to and including March 15, 2008. The petition was accordingly due on the next business day, March 17, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, in relevant part, provides: "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Sixth Amendment, in relevant part, provides: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." *Id.* amend. VI. The text of 28 U.S.C. § 2254(d), governing habeas corpus petitions for prisoners in state custody, is reproduced at Pet. App. 273a.

STATEMENT OF THE CASE

The Tennessee grand jury that indicted Steve Henley was composed using a process that, in violation of the Fourteenth Amendment, intentionally excluded women from serving as grand jury foreperson. Henley was convicted, but his court-appointed lawyer had made no effort to investigate mitigating evidence. The sentencing proceedings reached their nadir when, without ever having spoken to her before, Henley's counsel confused and surprised Henley's mother by spontaneously calling her to testify for her son's life, only to have her refuse.

This petition presents two questions that warrant this Court's review. First, it presents the purely legal question whether *Teague v. Lane*, 489 U.S. 288 (1989), precludes federal habeas petitioners from challenging under the Due Process Clause discrimination affecting the composition of their grand juries in cases, like Henley's, where the conviction became final before this Court's decision in *Campbell v. Louisiana*, 523 U.S. 392 (1998). The Sixth Circuit held that *Campbell*'s recognition that a defendant has standing to raise his own due process claim in these circumstances was a "new rule" under *Teague*, precluding its retroactive application. Pet. App. 6a–10a. That holding misreads this Court's precedents and is in direct conflict with the Fifth Circuit's decision in *Peterson v. Cain*, 302 F.3d 508, 515 (5th Cir. 2002), *cert. denied*, 537 U.S. 1118 (2003). If Henley's case had arisen in the Fifth Circuit, he would have had the opportunity to pursue his due process challenge.

Second, this petition presents the question whether Henley was prejudiced by his counsel's utter failure to prepare for the sentencing phase of this capital case—a

failure that led to the omission of substantial mitigating evidence and to counsel's bungled attempt to call Henley's mother to the stand without preparation or prior warning. The Tennessee Court of Criminal Appeals thought that Henley was obviously prejudiced. The sharply divided Tennessee Supreme Court disagreed, and the divided Sixth Circuit found that disagreement reasonable only by adopting reasoning that is irreconcilable with the decisions of this Court and other courts of appeals.

Factual History

1. In 1985, a grand jury indicted Henley on two counts of first-degree murder, two counts of felony murder, two counts of armed robbery, and one count of aggravated arson. *State v. Henley*, 774 S.W.2d 908 (Tenn. 1989). The grand jury that indicted Henley was composed of twelve grand jurors and a foreman who served as the thirteenth member. Tenn. R. Crim. P. 6 (1985). Although the twelve grand jurors were selected randomly from a list of qualified potential jurors, Tenn. R. Crim. P. 6(a)(1), the foreman was appointed at the sole discretion of the judge. Tenn. R. Crim. P. 6(g). Henley has alleged, and the State has not disputed, that women were purposefully excluded from serving as the foreperson of his grand jury. CAJA 247–49.[1]

Twelve votes were required to return an indictment and the foreman's vote counted toward that requirement. Tenn. R. Crim. P. 6(g). The foreman also carried out additional substantive responsibilities. He

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[1] "Trial Tr." refers to the trial proceedings; "Post-Conviction Tr." refers to the state post-conviction hearing; "CAJA" refers to the Sixth Circuit Joint Appendix.

was required "to assist and cooperate with the district attorney general in ferreting out crime," to "advise the [prosecutor] with respect to law violations and furnish him names of witnesses," and was authorized to "order the issuance of subpoenas." *Id.*; *see also Rose v. Mitchell*, 443 U.S. 545, 548 n.2 (1979). As this Court has previously recognized, given "the peculiar manner in which the Tennessee grand jury selection operated, and the authority granted to the one who served as foreman," the foreman "possessed virtual veto power over the indictment process." *Hobby v. United States*, 468 U.S. 339, 348–49 (1984).

2. Henley was then tried and convicted of aggravated arson and two counts of first-degree murder. *Henley*, 774 S.W.2d at 910. At sentencing, the State relied on a single aggravating factor, introducing evidence that Henley forced the victims into their home, shot them, and then set their house on fire. The State introduced evidence that one victim died instantly, but that the other may have survived a short time and died from smoke inhalation. Pet. App. 57a.

Jimmy Reneau, Henley's court-appointed (and now-deceased) attorney, did not prepare for sentencing. On state post-conviction review, Henley presented uncontradicted testimony that there had been "a *total* lack of preparation" and that Reneau "had done *absolutely no preparation whatsoever* with regard to mitigation." Post-Conviction Tr. 96 (emphases added). Reneau commissioned no "psychological or psychiatric evaluation," "did not speak with Henley's family members" or "members of the community familiar with Henley," and did not "investigate[] Henley's educational background" or "employment history." Pet. App. 53a. In lieu of an actual case in mitigation,

Reneau delivered an impromptu presentation that covered barely 30 transcript pages. Trial Tr. 1448–80.

Reneau's opening gambit was to call Henley's mother in open court, without ever having spoken to her before. Trial Tr. 1448. Startled, and "[n]ot understanding what was expected of her, she refused—in front of the jury—to testify." Pet. App. 52a. Reneau then turned to Henley's grandmother—the same grandmother who had attempted unsuccessfully to provide Henley an alibi at trial. Pet. App. 60a. Moreover, the prosecution's chief witness had testified that "it was on [his grandmother's] behalf that Henley had felt *compelled*" to commit the murders. Pet. App. 53a (emphasis added). Reneau's only other effort was to call Henley himself (though Reneau never had any meaningful consultation with Henley about the hearing or mitigating evidence). Post-Conviction Tr. 360–63. The best Reneau could muster in closing was the tepid observation that Henley had "[p]robably done nothing much more than work and live." Trial Tr. 1477. Reneau's efforts were, predictably, unsuccessful.

3. The Tennessee Supreme Court affirmed Henley's convictions and death sentences on direct appeal. 774 S.W.2d at 918. This Court denied certiorari. 497 U.S. 1031 (1990).

State Post-Conviction Proceedings

1. In state post-conviction proceedings, new counsel conducted the investigation Reneau should have done originally, and presented abundant mitigating evidence at an evidentiary hearing. Counsel presented testimony from Henley's mother, two sisters, two children, ex-wife, and an expert psychiatrist, all of whom explained that they would have testified at sentencing had they been timely

contacted by Reneau. Pet. App. 63a–66a. Henley's mother explained that, when Reneau called her to the stand, she was "just shocked" and refused to testify because she "didn't understand what [she] was supposed to do." Post-Conviction Tr. 243, 246. She and the other witnesses, however, would have testified that "they loved [Henley]; that he was a good and loving man ... that the offenses of which he was convicted were totally out of character for him; and that they were shocked by his arrest." Pet. App. 52a. Henley's sisters would have described Henley as a good brother, teaching one to ride a bike and getting the other her first job. Post-Conviction Tr. 294–95, 277. His son would have recounted going to work with Henley and getting to ride in the tractor with him. *Id.* at 269. Henley's daughter would have shared memories of going to the movies, taking trips to the race-car track, and spending family holidays together. *Id.* at 396–97. His ex-wife would have testified that Henley treated his stepson "[l]ike he was one of his own," providing financial support and staying involved even after their divorce. *Id.* at 336–37. All the witnesses would have pleaded for his life. Pet. App. 52a. A psychiatrist also would have testified about the close relationship Henley had with his late grandfather, opining that when Henley lost the family farm through bankruptcy it "was the equivalent to Henley of his grandfather dying a second time," leading Henley to cope by self-medicating with drugs and alcohol. Pet. App. 66a.

After the evidentiary hearing, the trial judge explained that he was "bother[ed]" by the sentencing proceedings and "would have liked to have had another witness maybe to have been put on ... [and] would have liked for the mother to have testified when she

refused." Pet. App. 67a–68a. Nevertheless, without citing any support, the judge hypothesized that the absence of additional witnesses must have been "trial strategy." *Id.*

2. The Court of Criminal Appeals reversed. Pet. App. 55a. It faulted Reneau for his total lack of investigation, and for calling Henley's mother to the stand without notice or preparation. The court explained that "of all the people that Reneau had available to him, the only two that testified were arguably the two least helpful." *Id.* at 53a.

The court had no difficulty finding that Henley was prejudiced by Reneau's failure to investigate and present evidence in mitigation. *Id.* at 54a–55a. Nor did the court "think it is assuming too much to conclude that a jury is going to be prejudiced against a defendant upon that person's *own mother* refusing to testify on his or her behalf." *Id.* at 52a (emphasis added); *id.* at 52a n.10 (noting juror's affidavit that: "If a man's own mother won't testify on his behalf then we know what we've got to do.").

3. The Tennessee Supreme Court reversed on a 3-2 vote. Pet. App. 68a. The majority found no prejudice because Henley's mother did not "openly refuse" to testify in front of the jury, but instead asked for a recess to speak with counsel and then did not take the stand. *Id.* at 74a. The majority also reasoned that the testimony of additional witnesses would have been cumulative, *id.* at 75a–77a, without grappling with Henley's grandmother's particular lack of credibility. The majority also found that Reneau was not deficient for failing to investigate Henley's background or mental condition. *Id.* at 78a. The dissenting Justices

adopted the well-reasoned opinion of the Court of Criminal Appeals. *Id.* at 81a.

4. In 1999, Henley filed a motion to reopen his state post-conviction proceedings. He presented undisputed evidence that he had been indicted by a grand jury from which women were systematically excluded as "foreman." CAJA 247–49. Indeed, Henley proved that, from 1974 through 1994, though women comprised 51.3% of the population of Jackson County, none ever served as foreman of a grand jury. CAJA 525–26. The trial court nonetheless denied relief, and the Court of Criminal Appeals affirmed. Pet. App. 89a–90a. Henley's claim was properly raised in a motion to reopen under Tenn. Code Ann. § 40-30-217(a)(1), because *Campbell v. Louisiana* established a constitutional right that the Tennessee Supreme Court had previously not recognized, having held in *State v. Coe*, 655 S.W.2d 903 (Tenn. 1983), that a male did not have "standing to contest the systematic exclusion of women from the grand jury." Pet. App. 89a. The court denied relief, however, on the ground that "retroactive application of *Campbell*" to Henley's case was "barred by *Teague*." Pet. App. 90a. The Tennessee Supreme Court denied discretionary review. *Henley v. State*, No. M1999-01402-SC-R11-CD (Tenn. Mar. 6, 2000).

Federal Habeas Proceedings

1. Henley timely sought a writ of habeas corpus, CAJA 14, but the district court granted the Warden's motion for summary judgment. It treated Henley's grand jury claim as a "third party standing ... due process challenge," Pet. App. 126a, and rejected Henley's claim under *Teague* on the grounds that neither *Peters v. Kiff*, 407 U.S. 493 (1972), nor *Hobby*, which were decided before Henley's conviction became

final, established a male defendant's "third party standing for a due process challenge to gender-based grand jury discrimination." Pet. App. 129a. The court also rejected Henley's ineffective assistance of counsel claim. It quoted the Tennessee Supreme Court's discussion in full, and concluded without further analysis that the Tennessee court's holding was not an unreasonable application of clearly-established law under 28 U.S.C. § 2254(d). *Id.* at 192a–98a.

2. The Sixth Circuit affirmed. It found that the state court reasonably concluded that a defendant's standing to raise his due process right to a jury untainted by discrimination was a "new rule" created by *Campbell* with no retroactive application. The Sixth Circuit concluded that *Peters* did not dictate the result in *Campbell* because the six-Justice majority in *Peters* found standing on split rationales. *Id.* at 8a. The Sixth Circuit conceded that *Hobby* addressed on the merits a white male's due process challenge to the exclusion of women and blacks from serving as the foreperson of a federal grand jury. *Id.* at 9a. However, the Sixth Circuit held that *Campbell* was not dictated by *Hobby* because, although *Hobby* "can be read as extending due process protection to men challenging the exclusion of women," it did not "provide[] *detail on the extent* of that [due process] protection." *Id.* (emphasis added). The Sixth Circuit also found that *Hobby*'s "casual manner" with respect to standing "paved the way" for contrary conclusions. *Id.*

The Sixth Circuit then cursorily addressed and summarily rejected Henley's ineffective assistance claim. Assuming deficient performance, the court found "nothing unreasonable" in the state court's prejudice ruling. *Id.* at 11a–12a. The court stated that

witnesses other than Henley's grandmother "likely would not have painted a better picture," and that there was no prejudice from counsel's failure to call a psychiatric expert. *Id.* The court never addressed Reneau's disastrous, spur-of-the-moment attempt to call Henley's mother to the stand.

Judge Cole dissented. He observed that this Court has "repeatedly stressed" that grand jury discrimination "hurts all defendants regardless of their race or gender and undermines the fair administration of justice." *Id.* at 20a. He concluded that *Campbell* simply applied *Hobby* and other well-established principles, and would have remanded for an evidentiary hearing on the merits of Henley's claim. *Id.* at 20a–26a. Judge Cole also would have held that Henley was prejudiced at sentencing. He reasoned that, "[b]ecause of the special relationship between a mother and child, not having one's own mother testify on their behalf, when one's life is at stake, would surely affect a juror's decision." *Id.* at 29a. He also believed that Henley was plainly prejudiced by Reneau's failure to present additional witnesses in mitigation. *Id.*

REASONS FOR GRANTING THE WRIT

This case raises two important issues that warrant this Court's review.

First, to the extent the Sixth Circuit actually meant to hold that a criminal defendant's "standing" to assert a violation of his own due process rights was newly minted in *Campbell*, that holding is obviously incorrect. *See Campbell*, 523 U.S. at 400 ("It is axiomatic that one has standing to litigate his or her own due process rights."). Indeed, six years before Henley's conviction was final, *Hobby* had addressed on the merits a white male's due process challenge to the exclusion of blacks

and women from serving as federal grand jury foreperson. To the extent the Sixth Circuit instead meant to hold that, before *Campbell*, a defendant had no clearly established due process right to a grand jury untainted by discrimination, that holding would also conflict with this Court's precedents. This Court has long recognized that the discriminatory composition of a grand jury affects the fundamental fairness of the indictment proceeding and subsequent trial, and it made clear in *Hobby* that a defendant's due process rights would be violated by the discriminatory selection of a foreperson where the foreperson has substantive duties and the selection affects the composition of the grand jury.

Certiorari is particularly warranted on this issue because the Sixth Circuit's holding squarely conflicts with the Fifth Circuit's decision in *Peterson*. In the Fifth Circuit, Henley would have been able to present evidence that he was indicted by a discriminatorily composed grand jury in violation of his due process rights, and that claim would have been decided on its merits. In the Sixth Circuit, Henley will be executed without the opportunity to offer proof of that due process violation.

Second, the Tennessee Court of Criminal Appeals found that Reneau's performance was constitutionally deficient, and no court since has disagreed with that finding. The sole question is whether Reneau's gross deficiencies prejudiced Henley. As this Court has repeatedly stated, a federal court should find prejudice unless it is confident that, but for the ineffective assistance, not a single juror would have reached a different result. *See Wiggins v. Smith*, 539 U.S. 510, 537 (2003) (finding "a reasonable probability that at

least one juror would have struck a different balance"); Tenn. Code Ann. § 39-2-203(h) (1986) (death sentence must be unanimous).

Reneau's deficiencies were stunning. He conducted no investigation whatsoever, called Henley's mother to the stand without notice (with disastrous consequences), and otherwise called only Henley's grandmother, who had earlier offered an alibi the jury rejected as a falsehood. Thus, Reneau left the jury to decide whether Henley should live or die with the definite (but erroneous) impression that his own mother was unwilling to plead for his life, indeed that no credible family member would vouch for him, and that there was no other mitigating evidence whatsoever.

It did not have to be that way. Henley's mother, sisters, son, daughter, and ex-wife, all would have testified on his behalf, had counsel simply asked them in advance. Psychiatric testimony would have demonstrated that Henley was self-medicating with drugs and alcohol and effectively in an emotional and psychological tailspin having just lost the family farm. Pet. App. 66a. In light of the solitary aggravating factor, Reneau's failure to investigate and offer such evidence is amply sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The Sixth Circuit was able to conclude otherwise only by adopting reasoning that conflicts with decisions of this Court and other courts of appeals.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE COURTS OF APPEALS OVER WHETHER *CAMPBELL V. LOUISIANA* ANNOUNCED A "NEW RULE"

A. A Defendant's Standing To Complain That His Due Process Rights Are Violated Through Indictment By A Discriminatorily Composed Grand Jury Was Established Long Before *Campbell*

For more than a century it has been settled law that discrimination in the composition of a grand jury violates the Constitution. This Court's earliest cases grounded a defendant's right to a grand jury untainted by discrimination in the Equal Protection Clause, but since that time, the Court has also considered similar claims under the Sixth Amendment, and the Court's own supervisory powers. This Court formally entertained such a claim under the Due Process Clause in *Hobby*, though *Hobby* merely proceeded on the Court's longstanding recognition that grand jury discrimination affects the fundamental fairness of criminal proceedings. And *Hobby* made it crystal clear that a defendant's due process right to a grand jury untainted by discrimination has nothing to do with the race or sex of the defendant or the excluded jurors, but rather protects the defendant's right to have critical procedures carried out by a competently constituted tribunal. *See also Campbell*, 523 U.S. at 401 (a defendant challenging the composition of his grand jury is "litigat[ing] whether his conviction was procured by means or procedures which contravene due process").

In light of these precedents, when Henley's conviction became final on June 28, 1990, *see* 497 U.S. 1031, a state court could not have reasonably believed that a defendant lacked standing to challenge as violative of his own due process rights the discriminatory composition of his own grand jury.

1. For almost 140 years, beginning with *Strauder v. West Virginia*, 100 U.S. 303 (1880), this Court has recognized that discrimination against black persons in the composition of grand or petit juries violates the Equal Protection Clause. *Accord, e.g., Virginia v. Rives*, 100 U.S. 313 (1880); *Neal v. Delaware*, 103 U.S. 370 (1881); *Bush v. Kentucky*, 107 U.S. 110 (1883); *Carter v. Texas*, 177 U.S. 442 (1900); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Cassell v. Texas*, 339 U.S. 282 (1950); *Reece v. Georgia*, 350 U.S. 85 (1955); *Arnold v. North Carolina*, 376 U.S. 773 (1964); *Coleman v. Alabama*, 377 U.S. 129 (1964); *Whitus v. Georgia*, 385 U.S. 545 (1967); *Rose*, 443 U.S. 545. And in the cases cited above, the Court has made clear that such a violation requires the indictment to be quashed. In so holding, the Court has explained that discrimination in the composition of the grand jury undermines the integrity and fairness of the proceedings, its impact on the charging decisions and subsequent trial is impossible to measure, and it calls into question the objectivity of those charged with bringing the defendant to judgment. *Rose*, 443 U.S. at 554–56.

To be sure, the Court originally applied the Equal Protection Clause in this context only when the grand jury's composition was challenged by a defendant of the same race as the excluded jurors. *See, e.g., Carter*, 177 U.S. 442; *Hernandez v. Texas*, 347 U.S. 475 (1954);

Alexander v. Louisiana, 405 U.S. 625 (1972). But before Henley's conviction became final, in reviewing a white defendant's claim that black jurors were unconstitutionally struck from the venire, five Justices agreed that the defendant and excluded jurors need not be the same race even for an equal protection-based challenge asserting the rights of the excluded jurors. *See Holland v. Illinois*, 493 U.S. 474, 488–89 (1990) (Kennedy, J., concurring); *id.* at 492 (Marshall, J., dissenting, with Brennan and Blackmun); *id.* at 507 (Stevens, J., dissenting). And the following Term, this Court confirmed that a defendant's standing under the Equal Protection Clause does not depend upon his and the excluded jurors' race. *Powers v. Ohio*, 499 U.S. 400, 409 (1991).

2. Long before Henley's conviction became final, this Court had reversed male defendants' convictions that were procured in violation of the law by virtue of the exclusion of women from the grand jury. Because the Court had yet to hold that sex discrimination violated the Fourteenth Amendment, it initially rested these holdings on its supervisory powers over the federal courts, *e.g.*, *Ballard v. United States*, 329 U.S. 187, 195 (1946), until it acknowledged the now axiomatic principles governing sex discrimination. *See, e.g.*, *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) ("Certainly, with respect to jury service, African-Americans and women share a history of total exclusion, a history which came to an end for women many years after ... for African-Americans."); *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973).

3. Before Henley's conviction became final, this Court had also held that a male defendant's Sixth and

Fourteenth Amendment rights to a petit jury drawn from a fair cross-section of the community are violated if women are systematically excluded from the venire. *See Taylor*, 419 U.S. 522; *Duren v. Missouri*, 439 U.S. 357 (1979). In reversing the convictions, this Court rejected the States' claims that a male defendant lacked "standing to object to the exclusion of women from his jury," and held that "there is no rule that [such] claims ... may be made only by those defendants who are members of the group excluded from jury service." *Taylor*, 419 U.S. at 526; *see also Duren*, 439 U.S. at 358 n.1. The Court held that a male defendant is "entitled to tender and have adjudicated the claim that the exclusion of women from jury service deprived him of the kind of factfinder to which he was constitutionally entitled." *Taylor*, 419 U.S. at 526.

4. Before Henley's conviction became final, a long line of cases had thus recognized that discriminatory grand jury selection undermines "the fairness and integrity of the whole proceeding against the prisoner," *Neal*, 103 U.S. at 396, "cease[s] to harmonize with our traditional concepts of justice," *Pierre*, 306 U.S. at 358, and "strikes at the fundamental values of our judicial system and our society as a whole," *Rose*, 443 U.S. at 556. In these cases, this Court had warned that a conviction procured after indictment by a discriminatorily composed grand jury cannot stand, because when a grand jury is composed by discriminatory means "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256–57 (1988). The Court had made clear that this structural defect "calls into question the objectivity of those charged

with bringing a defendant to judgment, [and] a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm." *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986); *see also Hill v. Texas*, 316 U.S. 400, 406 (1942) ("Where ... timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand because the Constitution prohibits the procedure by which it was obtained.").

In *Peters v. Kiff*, this Court addressed these concerns in due process terms when a white defendant objected to the exclusion of black grand jurors. Three Justices in the lead opinion concluded that any defendant can challenge a discriminatory grand jury selection process as a denial of due process. 407 U.S. at 504. Three Justices concurring in the judgment avoided the constitutional question because they concluded that a white defendant had standing to challenge the exclusion of black jurors under a federal statute that prohibits racially discriminatory grand jury selection. *Id.* at 505–06 (White, J.). All six Justices in the *Peters* majority rejected the argument that the defendant and excluded jurors need be of the same race. *Id.* at 506-07. In fact, even the dissenting Justices did not dispute a defendant's standing to raise the due process claim. They argued only that the claim should not be treated as structural error and should require proof of actual prejudice. *Id.* at 511.

Prior to *Peters*, the courts of appeals had generally held that defendants lacked standing to contest the composition of their grand jury if they were not the same race or sex as the excluded jurors. *Id.* at 506–07. In the years between *Peters* and *Hobby*, however, these courts generally reversed course and interpreted

Peters as holding that all defendants may contest the discriminatory composition of their grand jury. *See, e.g., Ferguson v. Dutton*, 477 F.2d 121, 121 (5th Cir. 1973) (observing that "the tenor of the law was greatly altered by ... *Peters*" and no longer following *Mosley v. Smith*, 404 F.2d 346 (5th Cir. 1968)). Indeed, courts interpreted *Peters* as holding that the race or sex of the defendant and jurors was irrelevant to a defendant's due process standing. *See, e.g., LaRoche v. Perrin*, 718 F.2d 500, 502 (1st Cir. 1983), *overruled in part on other grounds, Barber v. Ponte*, 772 F.2d 982 (1st Cir. 1985); *Mayfield v. Steed*, 473 F.2d 691, 691 (8th Cir. 1973); *State v. Hardy*, 235 S.E.2d 828, 834 (N.C. 1977); *White v. State*, 196 S.E.2d 849, 853 (Ga. 1973); *see also Folston v. Allsbrook*, 691 F.2d 184, 186 n.3 (4th Cir. 1982) (noting that "lower court decisions and commentators generally ... construed the Supreme Court's decisions in *Taylor* ... and *Peters* ... as indicating that standing exists" when a male alleges that "women were systematically underrepresented" on the grand jury that indicted him). Moreover, those courts that considered the issue were unanimous in holding that federal defendants, regardless of race or sex, could challenge under the Due Process Clause the discriminatory selection of their federal grand jury foreperson.[2] These courts divided only on the

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[2] *See United States v. Cross*, 708 F.2d 631 (11th Cir. 1983) (white male defendant had standing to challenge underrepresentation of women and blacks); *United States v. Holman*, 680 F.2d 1340 (11th Cir. 1982) (same); *United States v. Coletta*, 682 F.2d 820 (9th Cir. 1982) (white male defendants had standing to challenge exclusion of women and minorities); *United States v. Aimone*, 715 F.2d 822 (3d Cir. 1983) (addressing male defendant's challenge to underrepresentation of females); *United States v. Hobby*, 702 F.2d

underlying merits of the claim itself—*i.e.*, whether such discrimination in the selection of a federal grand jury foreperson, given the particular selection process used and the ministerial nature of the federal foreperson's duties, so undermined fundamental fairness as to require the indictment to be quashed.

5. Before Henley's conviction became final, this Court addressed that due process question on the merits in *Hobby*. There, a white male challenged the exclusion of blacks and women from serving as foreperson of his federal grand jury. In light of this Court's precedent, it is unsurprising that the Court treated as a given that the white-male defendant had standing to raise his own due process challenge to the exclusion of blacks and women from serving as his grand jury foreperson. This Court emphasized that it was "well settled" that "purposeful discrimination against Negroes or women in the selection of federal grand jury foremen is forbidden by the Fifth Amendment to the Constitution." 468 U.S. at 342. Nevertheless, the Court found that such discrimination in the selection of a *federal* grand jury foreperson—albeit "forbidden"—did not violate the defendant's own due process rights because the federal foreperson is selected from among the members of an already properly constituted grand jury and performs only ministerial functions. *Id.* at 344–45.

The Court went out of its way, though, to distinguish cases in which the selection of a grand jury foreman *would* affect the composition of the grand jury. The Court highlighted *Tennessee*'s grand jury system as an example of one in which purposeful

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466 (4th Cir. 1983) (addressing white male defendant's challenge to underrepresentation of blacks and females).

exclusion by race or sex *would* "distort the overall composition of the array or otherwise taint the operation of the judicial process." *Id.* at 348. The Court further distinguished cases in which the grand jury foreman exercises substantive authority, again holding up *Tennessee* as the prototype where the foreman's powers "stand in sharp contrast to the ministerial powers of the federal counterpart." *Id.* The Court took pains to explain that "the federal foreman, unlike the foreman in [Tennessee], cannot be viewed as the surrogate of the judge." *Id.*; *see also Campbell*, 523 U.S. at 401 (describing *Hobby* as holding that "discrimination in the selection of a federal grand jury foreperson did not infringe principles of fundamental fairness *because* the foreperson's duties were 'ministerial'") (emphasis added). Thus, six years before Henley's conviction became final, this Court made it absolutely clear that, regardless of a defendant's race or sex, discrimination in the selection of the grand jury foreperson in a system like Tennessee's would violate the defendant's own due process rights.

B. *Campbell* Cannot Reasonably Be Viewed As Having Announced A "New Rule" Of Due Process Standing

1. In a straightforward application of black-letter standing law, and the settled principles culminating in *Hobby*, the *Campbell* Court *unanimously* concluded that a white defendant could challenge under the Due Process Clause the exclusion of black persons from serving as grand jury foreperson in Louisiana, which utilizes a system like Tennessee's. This Court relied on its longstanding recognition that, if the process used to select grand jurors is discriminatory, "doubt is cast over the fairness of all subsequent decisions." 523 U.S.

at 399. The Court characterized as "axiomatic" the principle that "one has standing to litigate his or her own due process rights," and explained that a defendant challenging the discriminatory composition of his grand jury is simply "litigat[ing] whether *his* conviction was procured by means or procedures which contravene due process." *Id.* at 400–01 (emphasis added); *see also id.* at 407 n.3 (Thomas, J., concurring in part and dissenting in part); *Rose*, 443 U.S. at 556 ("the accused" is "harm[ed] ... indicted as he is by a jury from which a segment of the community has been excluded").

This Court explained that in *Hobby*, having implicitly accepted the defendant's standing, it had "skipped ahead to whether a remedy was available" in the federal system. 523 U.S. at 401. The Court summarily rejected the state court's view that *Hobby* established that a defendant lacked *standing* if the foreperson's duties were ministerial. *Id.* "Its interpretation of *Hobby*," this Court explained, "is inconsistent with the implicit assumption of standing we have just noted *and with our explicit reasoning in that case*." *Id.* at 402 (emphasis added).

On the merits, the Court noted that, unlike discriminatory appointment in the federal system at issue in *Hobby*, *Campbell*'s challenge to Louisiana's procedures "implicates the impermissible appointment of a member of the grand jury." *Id.* Indeed, the Court observed, "[t]he significance of this distinction was acknowledged by *Hobby*[]," when "*Hobby* pointed out discrimination in selection of the foreperson *in Tennessee* was much more serious than in the federal system because the former can affect the composition

of the grand jury whereas the latter cannot." *Id.* at 402–03 (emphasis added).

2. This application of settled principles did not under any reasonable understanding announce a "new rule" under *Teague*. *Teague* explained that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States .... To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." 489 U.S. at 301. It does not prohibit retroactive application of a decision that is "'merely an application of the principle that governed'" a prior Supreme Court case. *Id.* at 307 (citation omitted); *see also Stringer v. Black*, 503 U.S. 222, 228 (1992) (decision that "applied the same analysis and reasoning" of previous decision does not announce a new rule).

This Court undertakes the *Teague* inquiry in the interest of "comity." *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring in the judgment). Here, if the State was on notice that it could not discriminatorily compose its grand juries and that Henley could raise a due process complaint to being indicted by a procedure that undermines the fairness and integrity of the proceedings, comity does not demand federal abstention and Henley is entitled to the application of that standing principle on federal habeas. *See also Saffle v. Parks*, 494 U.S. 484, 488 (1990) ("Foremost among the[] [purposes of the habeas writ] is ensuring that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of the proceedings.").

Applying those principles, *Campbell* cannot reasonably be deemed a "new rule." *First*, it certainly

imposed no new substantive obligations on the States. The States have for more than a century been on clear notice that they may not discriminate in composing grand juries. *Supra* 13-20.

Second, *Campbell* broke no new ground concerning defendants' due process rights. It merely applied the principle that governed *Hobby* and other cases decided before Henley's conviction became final. 489 U.S. at 307. Indeed, the *Campbell* Court rejected the state court's analysis precisely because it was inconsistent with the "implicit" and "explicit reasoning" of *Hobby*. 523 U.S. at 402.

Campbell also carries none of the traditional indicia of a new rule. This Court has asked, for example, whether there were dissents from the decision the defendant seeks to apply retroactively. Thus, in holding that *Caldwell v. Mississippi*, 472 U.S. 320 (1985), announced a new rule, this Court remarked that "[c]ertainly *Caldwell* was not seen as compelled by the three Justices of this Court who found a 'lack of authority' ... for the approach taken there." *Sawyer v. Smith*, 497 U.S. 227, 236–37 (1990); *see also O'Dell v. Netherland*, 521 U.S. 151, 159–60 (1997) ("The array of views expressed in *Simmons [v. South Carolina*, 512 U.S. 154 (1994),] itself suggests that the rule announced there was, in light of this Court's precedent, 'susceptible to debate among reasonable minds.'") (citation omitted). In contrast, *all nine* Justices agreed that Campbell had standing under the Due Process Clause. 523 U.S. at 400; *id.* at 407 n.3.

This Court has also asked whether the lower courts followed the rule the defendant seeks to apply before this Court applied it in the decision at issue. In *O'Dell*, for example, this Court found support for the

"conclusion that the rule of *Simmons* was new" because "[b]y 1988, no state or federal court had adopted the rule of *Simmons*." 521 U.S. at 166 n.3. At the time *Hobby* was decided, however, no federal court of appeals had held that a defendant in Henley's circumstances lacked standing under the Due Process Clause to challenge the discriminatory appointment of a federal foreman.

The Sixth Circuit nonetheless invoked *Teague* because in its view *Hobby* addressed "standing" in too "casual" a manner. Pet. App. 9a. But if *Hobby* addressed standing casually, that was only because (as the Court observed later in *Campbell*) "[i]t is axiomatic that one has standing to litigate his or her own due process rights." 523 U.S. at 400; *see also Duncan v. Louisiana*, 391 U.S. 145, 147 (1968) ("The Fourteenth Amendment denies the States the power to 'deprive *any person* of life, liberty, or property, without due process of law.'") (emphasis added); *Betts v. Brady*, 316 U.S. 455, 473 (1942) ("[T]he Fourteenth Amendment prohibits the conviction ... of one whose trial is offensive to the common and fundamental ideas of fairness and right ...."). The *Hobby* Court then proceeded to hold clearly on the merits that the existence of a due process violation—for a white male challenging the exclusion of black and female jurors—turns on whether the discrimination affected the composition of the body that issued the indictment and on the extent of the foreperson's powers.

Equally unavailing is the Sixth Circuit's attempt to rely on its decision in *Ford v. Seabold*, 841 F.2d 677 (6th Cir. 1988), as a demonstration that reasonable jurists continued to reject the existence of this due process right even after *Hobby*. The Sixth Circuit's

reliance on that earlier, facially flawed decision merely compounded its error here. Without any analysis, *Ford* had held, based on *Aldridge v. Marshall*, 765 F.2d 63 (6th Cir. 1985), that a male defendant cannot challenge the exclusion of female grand jurors under the Due Process Clause. 841 F.2d at 688. *Aldridge*, however, was decided *solely under the Equal Protection Clause.* 765 F.2d at 69. The decision in *Ford*—from the very same circuit making the error here—was thus so obviously erroneous that it cannot demonstrate the reasonableness of alternative views of the law in *Hobby*'s wake. *See Stringer*, 503 U.S. at 237.[3]

C. The Sixth Circuit's Decision Squarely Conflicts With The Fifth Circuit's Decision In *Peterson*

In *Peterson*, the defendant had filed his habeas petition beyond the one year statute of limitations. He argued, however, that his claim—alleging that the Lafayette Parish, Louisiana grand jury selection system systematically excluded black persons from serving as grand jury foreperson—was timely under 28 U.S.C. § 2244(d)(1)(C), which permits a collateral attack within one year of this Court's recognition of a

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[3] The Sixth Circuit's reliance on Justice Marshall's dissent from the denial of certiorari in *Ford v. Kentucky*, 469 U.S. 984 (1984), is even less persuasive. This Court has long held that denials of certiorari "'import[] no expression of opinion on the merits of the case,'" and "opinions accompanying the denial ... cannot have the same effect as decisions on the merits." *Teague*, 489 U.S. at 296 (citation omitted). Moreover, certiorari was denied in *Ford* only a few months after *Hobby*, and the defendant had not yet sought federal habeas relief, where the courts to address the issue had already held that this Court's decisions gave defendants standing in these circumstances. *Supra* 18 n.2.

new right. The defendant argued that his petition was timely because *Campbell* announced a new rule. The Fifth Circuit disagreed. 302 F.3d at 510–11. Applying *Teague*, *id.* at 511, it held that *Campbell* was "*dictated* by ... *Hobby*" and therefore did not announce a "new rule." 302 F.3d at 514–15 (emphasis added).[4]

The Fifth Circuit observed that *Campbell* applied the existing rule that "a white defendant has Fourteenth Amendment due process standing to litigate whether his conviction was obtained by means or procedures contravening due process when black venire members are discriminated against in the selection of his grand jury." *Id.* at 513–14. It reasoned that *Campbell* simply applied *Hobby*'s implicit acknowledgement that a white male defendant "'had standing to raise a due process objection to discriminatory appointment of a federal grand jury foreperson and skipped ahead to the question whether a remedy was available.'" *Id.* at 514 (quoting *Campbell*, 523 U.S. at 401).

The Fifth Circuit noted that Hobby's due process rights were not violated only because the federal foreperson was selected from an already properly empaneled grand jury and the federal foreperson's duties are ministerial. *Id.* In contrast, it explained that in *Campbell*, which addressed Louisiana's system (a system just like Tennessee's), the foreperson was selected separately by the judge, *id.*, and "the

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[4] *Peterson* addressed *Campbell*'s retroactivity in a statute of limitations case, but the Fifth Circuit has since applied the same *Teague* analysis in cases, like this one, where petitioners seek relief under § 2254(d). *Guillory v. Cain*, 250 Fed. Appx. 95 (5th Cir. 2007); *Crandell v. Warden La. State Penitentiary*, 72 Fed. Appx. 48 (5th Cir. 2003).

foreperson was selected not merely to conduct ministerial duties, but was also selected to act as a[n additional] voting member of the grand jury, a vote that directly impacted the defendant. To the extent that such a selection was made discriminatorily, it ran afoul of the *Hobby* implied assumption of due process." *Id.* at 514–15; *see also Mosley v. Dretke*, 370 F.3d 467, 476 (5th Cir. 2004) (explaining that *Hobby* concluded that "due process rights were implicated in the discriminatory selection of a grand jury" but not in the selection of a federal foreperson from within a properly empaneled grand jury), *cert. denied*, 543 U.S. 1154 (2005). The Fifth Circuit held that the due process "decision in *Campbell* was therefore dictated by ... *Hobby*." 302 F.3d at 515.

The Sixth Circuit's decision is different only in that the court purported to review the state court's *Teague* analysis through the lens of § 2254(d), but that gloss has no practical effect here. This Court has repeatedly explained that a rule is "dictated" by precedent if "a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell*, 521 U.S. at 156; *see also Lambrix v. Singletary*, 520 U.S. 518, 538 (1997) (*Teague* asks "whether *no other* interpretation was reasonable"). Accordingly, if the state court's invocation of a *Teague* bar was incorrect, then its denial of relief was necessarily also "objectively unreasonable" under § 2254(d).

In sum, if Henley had raised his habeas claim in the Fifth Circuit, he would have prevailed and been permitted to litigate the merits of his claim, *i.e.*, that he was indicted by a discriminatorily composed grand

jury. In the Sixth Circuit he now faces a death sentence and has no ability to litigate his due process claim. This Court's review is merited. Sup. Ct. R. 10.

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE SIXTH CIRCUIT'S ERRONEOUS PREJUDICE HOLDING, WHICH CONFLICTS WITH DECISIONS OF THE FIRST, THIRD, AND SEVENTH CIRCUITS

A. Henley Was Obviously Prejudiced By Reneau's Impromptu Attempt To Call His Mother At Sentencing

By calling Henley's mother to the stand in open court, Reneau promised the jury that they would hear why they should spare her son's life. When she refused to testify—because of Reneau's failure to prepare her—Reneau broke that promise to the jury. It is settled law in at least the First, Third, and Seventh Circuits (and many state courts) that such broken promises and the negative inferences reasonable jurors will draw weigh heavily in the prejudice calculus. The Sixth Circuit's failure to appreciate this prejudicial impact—indeed, its failure even to consider the prejudice caused by this extraordinary miscalculation at all—conflicts with those decisions and this Court's reasoning in *Wiggins*.

In *Ouber v. Guarino*, the First Circuit found prejudice where counsel reneged on a promise that the defendant would testify. 293 F.3d 19, 32–35 (1st Cir. 2002). That "stunning error," *id.* at 35, the court explained—"failing to present the promised testimony of an important witness—was not small, but monumental," *id.* at 33. In *Anderson v. Butler*, the First Circuit found that counsel's failure to introduce

promised expert psychiatric testimony was prejudicial, described it as a "speaking silence," and emphasized that "little is more damaging than to fail to produce important evidence that has been promised." 858 F.2d 16, 17-18 (1st Cir. 1988). Likewise, in *United States ex rel. Hampton v. Leibach*, the Seventh Circuit found prejudice in part because counsel broke his promise to present testimony establishing that the defendant was not affiliated with a gang. 347 F.3d 219, 257–60 (7th Cir. 2003); *Harris v. Reed*, 894 F.2d 871, 879 (7th Cir. 1990). In *McAleese v. Mazurkiewicz*, the Third Circuit stated that "[t]he failure of counsel to produce evidence which he promised the jury ... is indeed a damaging failure sufficient of itself to support a claim of ineffectiveness of counsel," and explained that "[t]he rationale for holding such a failure to produce promised [witnesses] ineffective is that ... one may infer that reasonable jurors would think the witnesses to which counsel referred ... were unwilling or unable to deliver the testimony he promised." 1 F.3d 159, 166–67 (3d Cir.), *cert. denied*, 510 U.S. 1028 (1993).[5] In *Wiggins*, moreover, this Court supported its prejudice finding by noting that counsel had promised the jury it would hear

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[5] Even the *Tennessee* courts have explained that where counsel fails to introduce promised evidence, that "[o]*bviously* ... destroy[s] his personal credibility with the jury, such that the defendant would be unable to re[ceive] an impartial verdict." *State v. Collins*, 2006 Tenn. Crim. App. LEXIS 100, at *17 (Tenn. Crim. App. Jan. 31, 2006) (emphasis added); *see also Commonwealth v. McMahon*, 822 N.E.2d 699, 712 (Mass. 2005) (unfulfilled promises "can have drastic ramifications"); *State v. Moorman*, 358 S.E.2d 502, 510-11 (N.C. 1987) ("If the fact finder loses confidence in the credibility of the advocate [due to his failure to produce evidence promised'], it loses confidence *in the credibility of the advocate's cause.*") (emphasis added).

about Wiggins's difficult childhood, but "never followed up on this suggestion." 539 U.S. at 536.

The Sixth Circuit's failure to appreciate the obviously prejudicial impact of Henley's mother's refusal to testify also conflicts on different grounds with the Third Circuit's decision in *Marshall v. Cathel*, 428 F.3d 452 (3d Cir. 2005), *cert. denied*, 547 U.S. 1035 (2006). In *Marshall*, three sons testified favorably for their father during the guilt phase, but were conspicuously absent from sentencing. *Id.* at 470–71. The Third Circuit granted relief under § 2254(d), because the state court unreasonably found no prejudice. Indeed, it observed that: "Surely the jury was left wondering why the sons would not have pled for their father's life and could have reasonably drawn a negative inference from their absence from the courtroom during the penalty phase, as well." *Id.* at 471. Studies of capital juries likewise show that testimony by family-member witnesses is expected and its "absence ... [i]s unfavorably noted." Scott E. Sundby, *The Jury As Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 Va. L. Rev. 1109, 1152 (1997).

By ignoring the decisions of this Court and other courts of appeals, the Sixth Circuit failed to appreciate that the Tennessee Supreme Court's conclusion was an unreasonable application of *Strickland* under § 2254(d)(1). The state court found no prejudice because the juror's affidavit at the state post-conviction hearing was inadmissible, and Henley's mother did not "openly refuse" to testify. Pet. App. 74a. But the affidavit stated only what was painfully obvious. And a jury might draw an even worse conclusion from a defendant's mother who has calmly

and rationally concluded that she has nothing positive to say in defense of her son's life.

The state court also found no prejudice because the jury was instructed not to base its decision "upon speculation about why a particular witness did not testify." *Id.* That is clearly erroneous. The trial judge stated only that the jury "heard all of the evidence ... all of which you will carefully weigh and consider." Trial Tr. 1485. The jury was never instructed to disregard Henley's mother's refusal to testify, Pet. App. 61a, and such an instruction would have been like "'throw[ing] a skunk into the jury box and instruct[ing] the jurors not to smell it.'" *O'Rear v. Fruehauf Corp.*, 554 F.2d 1304, 1309 (5th Cir. 1977) (citation omitted).

Despite contrary reasoning in other circuits, the conclusion of the majority of state and federal appellate judges that have reviewed this case, and this Court's holding that "an inadequate *or harmful* ... argument, when combined ... with a failure to present mitigating evidence, may be *highly relevant* to the ineffective-assistance determination," *Dobbs v. Zant*, 506 U.S. 357, 359 n* (1993) (emphases added), the Sixth Circuit did not even bother to address the potential prejudice here. Under the precedents of this Court and holdings of the First, Third, and Seventh Circuits, there is plainly a reasonable probability that the result would have been different absent Reneau's ineptitude. Sometimes the prejudice inquiry requires difficult and abstract balancing. This is not one of those cases.

B. Henley Was Obviously Prejudiced By Reneau's Failure To Investigate And Call Additional Witnesses At Sentencing

Besides Henley's mother, the jury also never heard from several important witnesses, including six family members and an expert psychiatrist. The Tennessee Supreme Court and Sixth Circuit held that Reneau's failure to introduce this testimony did not prejudice Henley largely because it would have been cumulative of Henley's grandmother's testimony. Pet. App. 11a–12a.

In reality, his grandmother's testimony rotely catalogued the time they had spent together, and covered just eleven transcript pages. By contrast, the additional family members would have painted a far more robust picture of Henley as a person, including humanizing anecdotes, *supra* 6, that would have given the jury ample basis to return a life sentence, and would have told the jury something far more personal about Henley than Reneau's observation that he "had probably not done much more than work and live." Trial Tr. 1477. Moreover, studies of capital juries demonstrate that "family and friends testimony [i]s effective only when presented in sufficient detail so as to present a coherent and full factual picture of the defendant. [Otherwise], the jury [i]s likely to view such character testimony derisively, as an effort to manipulate them." Sundby, *supra*, at 1161.

Additionally, even if such testimony would have been similar in broad strokes to Henley's grandmother's testimony, the individual descriptions that humanized Henley and gave the jury a basis to choose life would not have been cumulative. As Judge

Cole explained, "having multiple family members plead for a defendant's life humanizes the defendant and makes it more likely that at least one juror will spare his life." Pet. App. 29a. And, as the Court of Criminal Appeals found, the jury may well have viewed Henley's grandmother with considerable hostility, as she was someone the jury already believed to be a liar who perhaps bore some responsibility for the crimes. The detailed testimony from additional witnesses not saddled with damaging credibility problems is not cumulative.

Finally, a psychiatrist would have testified about Henley's cognitive and psychological limitations, and his alcohol and drug abuse. Pet. App. 52a. The Sixth Circuit found no prejudice because the evidence was "similar enough to that found wanting in *Strickland* that it was not unreasonable to have treated Henley's claim the same way." Pet. App. 12a. That is comparing apples and oranges. The court incorrectly segregated this mitigating factor from the substantial evidence described above, *see Wiggins*, 539 U.S. at 534 (court required to "reweigh the evidence in aggravation against the *totality* of available mitigating evidence") (emphasis added), and unreasonably compared it to a case that involved "overwhelming aggravating factors," *Strickland*, 466 U.S. at 700.

Nor can this testimony be disregarded because the witnesses would have admitted that they had seen Henley abuse drugs, which "would have been inconsistent with the defendant's own testimony and harmful to the defense theory throughout the trial." Pet. App. 80a. Henley had, after all, already been convicted and counsel did not present a residual doubt case at sentencing. *See* Pet. App. 53a–54a; *see also*

Moore v. Johnson, 194 F.3d 586, 618 (5th Cir. 1999). Indeed, testimony about Henley's self-medication with drugs and alcohol would have *bolstered* the mitigation case and corroborated the psychiatric testimony. Like *Wiggins*, there was "little of the double edge" to the additional witnesses' testimony. 539 U.S. at 535.

CONCLUSION

The petition for certiorari should be granted, and the judgment should be reversed.

Respectfully submitted,

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